No. 80-1065

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

TWO RIVERS COMPANY,

Petitioner,

vs.

CURTISS BREEDING SERVICE, DIVISION OF SEARLE AGRICULTURE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DAVID S. KIDDER
TIMOTHY R. McCORMICK
2300 Republic National
Bank Building
Dallas, Texas 75201
214/655-7500

Counsel for Respondent Curtiss Breeding Service, Division of Searle Agriculture, Inc.

Of Counsel:

THOMPSON & KNIGHT
2300 Republic National
Bank Building
Dallas, Texas 75201

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Whether the Court of Appeals' holding that Two Rivers Company was precluded from recovering damages against Respondent on either a theory of strict liability or breach of warranty is in conflict with substantive pronouncements of the Texas Supreme Court.

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STATEMENT OF THE CASE

The action in the lower court was brought by the Petitioner, Two Rivers Company ("Two Rivers"), an Arkansas corporation, against Curtiss Breeding Service, a division of Searle Agriculture, Inc. ("Curtiss") and Hi-Pro Feeds, Inc. Petitioner alleged that it purchased semen, marketed by Curtiss, which caused syndactylism in the offspring of cattle owned by Two Rivers. Only four calves were identified as possibly having syndactylism. However, Petitioner sought damages for the loss of prospective market value of all calves born in the same generation as the suspect calves, and calves born in the following generation, even though a Curtiss product was not involved.

Syndactylism is a genetic abnormality that can only appear when both the sire and the dam are carriers of the recessive gene. Syndactylism is exhibited by the fusion or non-division of the functional digits of one or more feet of a cow. It is a hereditary genetic trait traced to the recessive gene.

The Court of Appeals properly noted, and the Petitioner has not claimed otherwise, that syndactylism is a biological trait that cannot be eliminated or detected until it manifests itself. Furthermore, the Court of Appeals properly noted that cattle breeders, including Petitioner, were aware that genetic traits cannot be eliminated or detected.

Curtiss marketed its semen through Hi-Pro Feeds, Inc. Each sale made by Curtiss included a disclaimer of all warranties, express or implied. Further, Curtiss' product brochures included an identical disclaimer.[1] In other words,

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[1]Notwithstanding the fact that artificial insemination is successfully employed in the breeding of livestock on a world-wide basis and Curtiss customers for many years have achieved satisfactory re-

Curtiss disclaimed all warranties, express or implied, to each person in the chain of distribution. The existence of the disclaimer is not in dispute.[2] Petitioner contends, however, that the holding of the Court of Appeals is incorrect because Petitioner never received the benefit of the disclaimer. Petitioner has, in its statement of facts, argued that (i) it never viewed the disclaimer since it hired a third party to select and purchase the product, and (ii) the third party was not an "agent" for the Petitioner. Petitioner's argument, however, was rejected by the Court of Appeals. The Court found, from the evidence, that the third party was an agent of the Petitioner, and that Respondent disclaimed the existence of any warranties, express or implied, to each person in the chain of distribution.

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sults, Curtiss Breeding Service, a division of Searle Agriculture, Inc., and its agents or employees, cannot guarantee the conception rate, quality or productivity to be obtained in connection with the use of its products or recommended techniques. Curtiss does warrant that all semen sold will be processed according to standards recommended by the American Veterinary Medical Association, and adopted by the National Association of Animal Breeders. IT MAKES NO OTHER WARRANTY OF ANY KIND, AND HEREBY DISCLAIMS ALL WARRANTIES, BOTH EXPRESS AND IMPLIED, OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

Further, neither Curtiss Breeding Service, nor any of its agents or employees, shall be responsible for any injury or damage caused to persons, animals or property through the negligent use or handling of its products, or for any damages or loss due to any defects in the containers used in connection therewith.

[2]Petitioner has, for the first time, suggested that the disclaimer is ineffective under Texas law because it is not "conspicuous." Petitioner's argument is specious. The only person who was not aware of the disclaimer was the Petitioner – and it had insulated itself from all contacts with the distribution process – and its agent *read* the disclaimer.

SUMMARY OF ARGUMENT

1. The Court of Appeals applied well-settled principles of law in concluding that the doctrine of strict liability did not apply in the case of a biological product which was not unreasonably dangerous. The Court of Appeals properly concluded that ordinary cattle breeders, with knowledge common to the community of cattle breeders, expected that semen would carry some recessive genetic traits.

2. The Court of Appeals properly concluded, applying well-settled principles of Texas law, that the type of loss allegedly suffered by the Petitioner was an economic loss governed by the law of commercial transactions. The Petitioner sought, in the Court below, a damage claim based upon the dimunition in market value of a herd of cattle caused by the "stigma" of a recessive genetic trait. This is the type of commercial loss that must be analyzed under the provisions of the Uniform Commercial Code.

3. The Court of Appeals properly concluded, applying well-settled principles of Texas law, that Curtiss properly disclaimed all warranties to each person in the chain of distribution of the product.

REASONS FOR DENYING CERTIORARI

I. The holding of the Court of Appeals is correct and is not in conflict with any decision of the Texas Supreme Court.

The thrust of Petitioner's application for Writ of Certiorari is that the Court of Appeals refused to follow well-settled principles of Texas law. Respondent disagrees.

The Court of Appeals was faced with a case of first impression — whether a seller of a natural product may be

held liable for an unknown and undiscoverable genetic abnormality over which the seller has absolutely no control; whether a natural product, unaltered by the Respondent, was "unreasonably dangerous;" and whether the "loss" sustained by the Petitioner was purely "economic" in character and thus governed by the Uniform Commercial Code. The conclusion of the Court of Appeals conforms to the underlying requirements of Texas law.

A. Texas Substantive Law Does Not Impose Liability for a Scientifically Unknowable Risk.

In *Crocker vs. Winthrop Laboratories,* 514 S.W.2d 429 (Tex. 1974), the Texas Supreme Court was forced to decide whether a manufacturer can be held strictly liable in tort for failing to warn of a scientifically unknowable risk. The Court concluded no:

> "[W]e are not prepared to hold . . . that in the case of a generally beneficial or good product the manufacturer's liability can be predicated upon the inadequacy of warning measured by those facts known at the time of trial. See, *generally, Basko vs. Sterling Drug, Inc.,* 416 F.2d 417 (2nd Cir. 1969), Restatement, Torts, 2nd, §402A, comment (k), Keaton: Products Liability Drugs & Cosmetics, 25 Vand. L. Rev. 131 (1972); Keaton, Products Liability — Inadequacy of Information, 48 Tex. L. Rev. 398 (1970)."

Id. at 433. The holding of the Texas Supreme Court was not altered in the later decisions in *Signal Oil & Gas Co. vs. Universal Oil Products,* 572 S.W.2d 320 (Tex. 1978); *Mid-Continent Aircraft Corp. vs. Curry County Spraying Service, Inc.,* 572 S.W.2d 308 (Tex. 1978); and *Nobility Homes of Texas, Inc. vs. Shivers,* 557 S.W.2d 77 (Tex.

1977). The Texas Supreme Court has never held that a manufacturer or seller can be held strictly liable in tort for an unknown or undiscoverable condition. To hold otherwise would make the manufacturer an insurer of its product, a result not accepted in Texas jurisprudence.

Petitioner claims that the Court of Appeals, in apparent disregard of *Erie R. R. vs. Tompkins,* 304 U.S. 64 (1938), refused to follow tests promulgated by the Texas Supreme Court in analyzing the "type" of loss sustained by Petitioner to determine whether the doctrine of strict liability applied. Curtiss disagrees.

The product marketed by Curtiss was a biological product. It was not altered or enhanced by Curtiss and the genetic characteristic in issue — syndactylism — could not be detected or prevented. The Court of Appeals recognized that the Texas Supreme Court had not been faced with identical issues: (i) whether the doctrine of strict liability applies where one product is biologically combined with another to form, by natural process, a continuation of those products; and (ii) whether the doctrine applies in the case of an unknown and undiscoverable natural genetic abnormality. The Court concluded, following the reasoning of the Texas Supreme Court in *Nobility Homes of Texas, Inc. vs. Shivers,* 557 S.W.2d 77 (Tex. 1977), that the theoretical basis and policy rationale of contract law should govern the type of loss sustained by the Petitioner. The Texas Supreme Court, in *Nobility Homes,* quoting from Chief Justice Trainer in *Seeley vs. White Motor Co.,* 63 Cal.2d. 9, 15, 45 Cal. Rptr. 17, 23, 403 P.2d 145, 151 (1965), stated the rationale as follows:

> "The law of sales has been carefully articulated to govern the economic relations between suppliers and

consumers of goods. The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code, but, rather, to govern the distinct problem of physical injuries.

* * *

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumers business unless he agrees that the product was designed to meet the consumer's demands."

B. The Court of Appeals properly followed Texas law in concluding that the product in question was not unreasonably dangerous.

The Petitioner has argued that Curtiss sold a genetically defective product that was unreasonably dangerous. This Court does not have to reach this issue because the Court of Appeals found that strict liability analysis was inappropriate to the facts of this case. However, even if the Court of Appeals was incorrect, the Petitioner failed to establish an essential element — that the product was unreasonably dangerous.

Petitioner sought damages for the loss of market value of the entire herd, and for the value of four (4) calves born with syndactylism. The damage group included those calves which actually received a syndactyl gene from the semen marketed by Respondent, and a second group composed of calves that were not sired with the semen, but nevertheless had the "stigma" of the trait in the herd.

The Texas doctrine of strict liability subjects a manufacturer to liability if it sells a defective product which is "unreasonably dangerous" and then causes harm to the user. *Nobility Homes of Texas, Inc. vs. Shivers,* 557 S.W.2d 77, 80 (Tex. 1977); *Reyes vs. Wyeth Laboratories,* 493 F.2d 1264, 1972 (5th Cir. 1974). The Court of Appeals concluded that the requirement that evidence demonstrate that the product be "unreasonably dangerous" is not an empty one — the Texas courts have continually required proof that the product be unreasonably dangerous. *See, e.g., Rourke vs. Garza,* 530 S.W.2d 794 (Tex. 1976). The mere fact that a "defect" is shown to exist is simply not enough to apply strict liability analysis to a manufacturer or seller.

The Court of Appeals below, in reviewing the evidence and characterizing the "type" of loss, concluded that the proper test to apply, following principles of Texas law, was the "ordinary consumer expectation" test. In applying the test, the Court concluded, properly, that there was no evidence supporting the Petitioner's claim that the product was unreasonably dangerous in light of the consumer expectation test. Indeed, the evidence in the lower court conclusively established that the Petitioner was aware that there was always a risk of the presence of unwanted recessive characteristics in semen, and that the

cattle breeder accepts the risk of any unknown or unwanted genetic defects.

C. Strict Liability in Tort Does Not Apply in Cases of Economic Loss.

Petitioner's claim that the doctrine of strict liability should govern the facts in this case is erroneous for an additional reason. The Court of Appeals properly noted that the damages sought by Petitioner were not for physical injuries, but, rather, economic losses that amounted to no more than a "failure to fulfill commercial expectations." This is the classic example of the type of loss that the Texas Supreme Court has held must be governed by the law of commercial transactions, the Uniform Commercial Code. This concept was reaffirmed in *Nobility Homes of Texas, Inc. vs. Shivers,* 557 S.W.2d 77 (Tex. 1977). The distinction between actions for personal injuries and actions for economic loss are more than technical, they rest upon sound policy reasons. A manufacturer cannot be held to a level of performance unless the parties agreed that the product was designed to meet a specified standard.

II. The Court of Appeals Applied Well Settled Principles of Texas Law in Concluding that the Respondent Disclaimed The Existence of Any Implied Warranty.

Petitioner's second argument is that the Court below failed to follow Texas law because the disclaimer of warranty was not "conspicious" and therefore ineffective against Petitioner. Petitioner is raising, in effect, a challenge to the facts found by the Court — not a challenge to the legal theories.

Petitioner has raised a rather simplistic argument — that if the Petitioner, or any other purchaser, could insulate itself from the chain of distribution by contracting with third parties, it can avoid the otherwise permissible right of a manufacturer to disclaim the existence of warranties. Petitioner, however, has cited no authority for this novel proposition. The Court of Appeals, in reviewing applicable principles of Texas law, concluded that, under the facts of the case, Curtiss had adequately disclaimed the existence of any implied warranty.

The right of a manufacturer to disclaim the existence of implied warranties was reaffirmed by the Texas Supreme Court in *Nobility Homes of Texas, Inc. vs. Shivers,* 557 S.W.2d 77 (Tex. 1977). In response to the argument that dispensing with privity would impose unlimited and unforeseeable liability upon manufacturers, the Court held, in *Nobility Homes*:

> "These fears are justified when manufacturers are held strictly liable for economic loss under the terms of Section 402A of the Restatement (Second) of Torts. But, these fears are not justified when manufacturers are held liable by the Uniform Commercial Code because the Code, itself, protects manufacturers against unlimited and unforeseeable liability. First, the Uniform Commercial Code allows manufacturers to restrict their liability by the exclusion or modification of both implied and express warranties. Tex. Bus. & Comm. Code Ann. §2.316 (1967). Second, manufacturers' liability is restricted by the very terms of the Uniform Commercial Code sections which furnished the consumer's implied warranty remedies, §§2.314 and 2.315."

Id. at 82. The Court of Appeals properly concluded that, because Respondent had disclaimed the existence of any implied warranty, it had satisfied the obligations under Texas law. To accept Petitioner's argument would render meaningless the provisions of Texas law which allow the manufacturer the right to disclaim the existence of implied warranties, and would, effectively, overrule the decision of the Texas Supreme Court in *Nobility Homes.*

CONCLUSION

Petitioner has failed to demonstrate any significant issue justifying review on Writ of Certiorari. The Court of Appeals applied well-settled principles of Texas law in rejecting the arguments suggested by Petitioner. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

David S. Kidder
Timothy R. McCormick
2300 Republic National
Bank Building
Dallas, Texas 75201
214/655-7500

Counsel for Respondent

Of Counsel:

Thompson & Knight
2300 Republic National
Bank Building
Dallas, Texas 75201

CERTIFICATE OF SERVICE

I, Timothy R. McCormick, a member of the Bar of the Supreme Court of the United States, certify that, pursuant to the provisions of Rule 28 of the Rules of the Supreme Court of the United States, three (3) copies of the foregoing Brief in Opposition have been served upon counsel for Petitioner, James N. Haltom, Esq., Hubbard, Patton, Peak, Haltom & Roberts, 700 Texarkana National Bank Building, Post Office Box 1928, Texarkana, Texas 75504 by depositing such in the United States Post Office, with first class postage pre-paid, addressed to counsel of record at his post office address. I further certify that all parties required to be served have been served.

Dated: January 21, 1981

/s/ TIMOTHY R. MCCORMICK

TIMOTHY R. MCCORMICK